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March 20, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 27, 2006

Case Number: TSO-0437

This decision concerns the eligibility of XXXX X. XXXXX (hereinafter referred to as "the Individual") to obtain an access authorization restored under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹

I. BACKGROUND

The present case concerns an individual who has applied for a DOE access authorization. The resulting background investigation, conducted by a DOE Local Security Office (LSO), revealed derogatory information that raised significant doubts about the Individual's eligibility to obtain an access authorization. Accordingly, the LSO requested that the Individual undergo a Personnel Security Interview (PSI). The PSI failed to resolve these security concerns. The LSO then requested that Individual undergo a forensic psychiatric evaluation by a DOE Psychiatrist (The DOE Psychiatrist). After receiving the DOE Psychiatrist's Report, the LSO concluded that the Individual failed to resolve those doubts raised by the Individual's alcohol and illegal drug use. Accordingly, an administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). The Notification Letter alleges that the Individual has

(1) Trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law. 10 C.F.R.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

§710.8(k) (Criterion K); and

(j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. §710.8(j) (Criterion J)

The Individual filed a request for a hearing in which he made a general denial of the allegations contained in the Notification Letter. This request was forwarded to the Director of the Office of Hearings and Appeals (OHA), who appointed me as Hearing Officer.

At the Hearing, the LSO presented one witness, the DOE Psychiatrist. The Individual testified on his own behalf and called two witnesses: his supervisor and the owner of the DOE contractor which employs him. *See* Transcript of Hearing, Case No. TSO-0437 (hereinafter cited as “Tr.”).

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. THE INDIVIDUAL'S CREDIBILITY

Throughout the security clearance process, beginning with his completion and submission of a Questionnaire for National Security Positions (QNSP) on April 20, 2004, and continuing through the hearing, the Individual has provided false, misleading and/or contradictory information to Government Security Officials. Even though the Individual's Statement of Charges does not include any allegations brought under Criteria F or L, criteria that pertain to false statements made during the security clearance process, these prevarications are important. The Individual's consistent lack of candor impugns his credibility and requires me to give his testimony no weight. An example of the Individual's series of prevarications follows.

On November 29, 2004, the Individual was interviewed by a representative of the United States Office of Personnel Management (the OPM Representative). During this interview, the

Individual denied that he had ever been physically abusive or violent to his second wife and further denied that law enforcement authorities had ever been called to his home. DOE Exhibit 13 at 31. However, the record indicates that police were called to a residence occupied by the Individual and his second wife on April 23, 1994. The police reported that the Individual slapped and choked his second wife and threatened to kill her. As a result, the Individual was arrested on assault and domestic violence charges and was detained over night. DOE Exhibit 13 at 96. The Individual failed to list this arrest on his QNSP, even though he was required to. DOE Exhibit 10 at 7. On March 15, 2005, the Individual informed the OPM Representative that there was never any physical violence during his second marriage and that he was never involved with any law enforcement authority concerning any physical violence towards her. DOE Exhibit 13 at 108. During his January 26, 2006 PSI, the Individual denied having any encounters with law enforcement or any problems with violence during his second marriage. DOE Exhibit 11 at 47, 63-64. Later on in the PSI, he admitted being charged with domestic violence against his second wife. DOE Exhibit 11 at 90-92. At the hearing, the Individual was asked whether he had “ever been violent or committed an act of violence?” The Individual responded by stating “never.” Tr. at 68. The Individual was then asked if he was sure about that answer and then admitted he had been arrested after an argument with his wife. Tr. at 68. The Individual then provided an account of the circumstances leading to this arrest that omitted any mention of him hitting, threatening or choking his second wife. Tr. at 69. Under further cross examination the Individual admitted “my hands were on her neck area. . . .” Tr. at 69.

Against this background, I turn to the criteria before me.

IV. FINDINGS OF LAW AND FACT AND ANALYSIS

A. Criterion K

The Individual admits using marijuana during his college years, in the late 1960s and early 1970s. In August of 1995, the Individual’s employer at that time (Employer A) required him to provide a urine sample for drug testing. That urine sample tested positive for marijuana.² Employer A then required him to attend a three-week outpatient group therapy program. After the Individual had completed this program, Employer A enrolled him in a thirty day inpatient program for drug rehabilitation, where he received extensive group and individual therapy for his marijuana use. However, the Individual left this program after two weeks because he did not believe he had a drug problem. In December 1995, Employer A again required him to provide a urine sample for drug testing. This second sample tested positive for marijuana. As a result, Employer A fired the Individual.

In 2004, The Individual’s present employer filed a request for a DOE access authorization for him with the LSO. As discussed above, the Individual was requested to undergo a forensic psychiatric examination. That examination was conducted by the DOE Psychiatrist on June 1, 2006. At the conclusion of this examination, the Individual was requested to provide a urine

² At the time that this test was conducted, the Individual held a security clearance in the National Industrial Security Program. DOE Exhibit 6 at 5.

sample in order to screen the Individual for illegal drug use. That urine sample tested positive for marijuana. DOE Exhibit 6 at 9. In addition, the Individual's second wife had informed the OPM Representative that one of the reasons she had divorced the Individual was his abuse of alcohol and marijuana. DOE Exhibit 6 at 11.

On the basis of the information set forth above, the DOE Psychiatrist concluded that the Individual met the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders IV-TR (DSM-IV-TR) for cannabis abuse. DOE Exhibit 6 at 11; Tr. at 82-83. Accordingly, the information in the record provides a sound basis to invoke Criterion K.³

Illegal drug use evidences an unacceptable and disturbing disregard for laws prohibiting their use. Such disregard for the law raises concerns that the Individual may similarly disregard other laws, including those which protect classified information and special nuclear materials. *See Personnel Security Hearing, Case No. VSO-0116*, 26 DOE ¶ 82,765 at 85,602 (1997) *citing Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,512 (1995)). Moreover, the use of illegal drugs (and the disregard for law and authority that such use suggests) indicates a serious lapse in judgment and maturity. Involvement with illegal drugs may also render the user susceptible to blackmail or coercion.

³ The Statement of Charges also alleges that, in the 1970s, law enforcement officials found a plane leased by the Individual full of marijuana. The only evidence cited in the Statement of Charges in support of this charge was the DOE Psychiatrist's Report of Examination (which appears in the record as DOE Exhibit 6). The DOE Psychiatrist apparently was of the impression that the Individual had admitted being involved in a business transaction which involved the marijuana found in the plane. In his report, the DOE Psychiatrist, in support of his assertion that the Individual was involved in the purchases and sale of the marijuana found in the plane he was leasing, cited a statement made by the Individual in the PSI. That statement appears on page 98 of DOE Exhibit 11 (the transcript of the PSI). However, the Individual's statement in the PSI that was cited by the DOE Psychiatrist did not mention and was not made in the context of a discussion of the plane incident. Instead, it clearly indicates that the Individual had occasionally given money to acquaintances with the understanding that they would purchase marijuana to be used by the Individual and the acquaintance in question. So instead of being an admission that the Individual was engaging in an international drug smuggling operation, it was merely an admission that the Individual had, through a third party, purchased marijuana for private use. At the hearing, the Individual claimed that he had been absolved of any involvement with the marijuana found in his plane by law enforcement authorities. Tr. at 70. At the hearing, the Individual claimed that he had leased the plane to import seafood from Mexico and that the pilot he had hired had, without the Individual's knowledge, used the plane to smuggle marijuana. Tr. at 50-51. Since the only information in the Record indicating that the Individual was involved in drug smuggling is the DOE Psychiatrist's somewhat suspect recollection that the Individual admitted involvement with a marijuana smuggling scheme, I did not rely on this allegation when concluding that the LSO properly invoked Criterion K.

The only evidence in support of mitigation of the security concerns raised under Criterion K are the Individual's assertions that he no longer uses illegal drugs and plans to refrain from using them in the future.⁴ These assertions are insufficient to mitigate the serious security concerns raised by the Individual's illegal drug use. Because, the Individual has been less than honest during this proceeding about other matters, one of which I have discussed above, I do not accord any weight to his assertions.

Most important, the Individual has been less than forthright about his marijuana use on many occasions during this entire proceeding. On April 20, 2004, the Individual submitted a QNSP to the LSO. Question 24(a) of this QNSP asks: "Since the age of 16 or in the last 10 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . .?" (emphasis in the original). The Individual responded by indicating that he had used marijuana on one occasion: a December 1995 holiday party. The Individual had, in fact, tested positive for marijuana in August 1995 and in December 1995. Question 24(b) asks "Have you ever illegally used a controlled substance while . . . possessing a security clearance?" (emphasis in the original). The Individual answered: "No." In fact, the Individual had been terminated for marijuana use by Employer A in December 1995. At the time that he was terminated, the Individual held a security clearance from the National Industrial Security Program. DOE Exhibit 6 at 5. At the PSI, the Individual initially indicated that his use of marijuana was limited to his college years in the late 1960s and early 1970s. PSI at 54-55. The Individual further indicated that his last use of marijuana occurred "sometime prior to [19]90." PSI at 58. The Individual further indicated that he had never been hospitalized or received counseling for drug use. PSI at 61. In fact, the Individual had attended a three-week outpatient group therapy program in 1995 that was followed by two weeks as an inpatient at a drug rehabilitation facility. DOE Exhibit 13 at 25. On June 1, 2006, the Individual was the subject of a forensic psychiatric evaluation conducted by the DOE Psychiatrist. During this evaluation, the DOE Psychiatrist asked the Individual when he last used marijuana. The Individual indicated that his last use occurred in 1995. DOE Exhibit 6 at 6. At the conclusion of the DOE Psychiatrist's evaluation of the Individual, he was requested to provide a urine sample for drug screening. That urine sample tested positive for marijuana. DOE Exhibit 6 at 9.

Given the Individual's long history of providing the DOE with misleading information concerning his drug use, I give no probative value to his assurances that he will refrain from illegal drug use in the future. Moreover, the DOE Psychiatrist has convincingly testified that the Individual's marijuana use is part of a larger problem: the Individual suffers from a cannabis abuse disorder. Until the Individual recognizes that he has this problem and takes affirmative measures to address it, the probability that he will continue to use marijuana is too great for him to be considered to be an acceptable risk. Accordingly, I find that the security concerns raised under Criterion K have not been resolved.

⁴ At the hearing, the Individual called two witnesses on his behalf. Neither witnesses' testimony was relevant or useful.

B. Criterion J

The Notification Letter alleges that the Individual “has been or is a user of alcohol habitually to excess or has been diagnosed by a psychiatrist as alcohol dependant or as suffering from alcohol abuse.” The bases for this charge are the Individual’s Driving While Intoxicated (DWI) arrest on August 5, 2000, his treatment at an inpatient substance abuse rehabilitation program at the request of his second wife, and the DOE Psychiatrist’s conclusion that the Individual met the criteria for alcohol related disorder, not otherwise specified (ARD-NOS) set forth in the Diagnostic and Statistical Manual of the American Psychiatric Association, Fourth Edition, Text Revision (DSM-IV TR).

It is important to note that the Notification Letter does not allege that the Individual suffers from alcohol abuse or dependence.⁵ Therefore, the only issue before me under Criterion J is whether the Individual habitually uses alcohol to excess. I note that this issue is difficult to address. Neither the Part 710 Regulations (the Regulations) nor the DOE’s Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, set forth at Appendix B to Subpart A of 10 C.F.R. Part 710 (the Guidelines) define the terms “habitual” or “excess.” It is safe to assume that “by excess” means intoxication. Webster’s Ninth Collegiate Dictionary provides the following definitions of habitual, which state in pertinent part: “having the nature of a habit: being in accordance with habit: CUSTOMARY, . . . doing, practicing or acting in some manner by force of habit, . . . resorted to on a regular basis, [or] inherent in an individual.” Webster’s Ninth Collegiate Dictionary (1985) at 545.

I turn now to the issue of whether the LSO has a sufficient basis to invoke Criterion J in the instant case.

The record shows that the Individual has one arrest for DWI. The record also shows that the Individual’s second wife had requested that the Individual quit drinking and that the Individual had entered into an inpatient treatment program for substance abuse while they were married.⁶ After leaving the inpatient treatment program, the Individual quit drinking and began attending Alcoholics Anonymous (AA) meetings. The Individual refrained from using alcohol and continued to attend AA meetings for over five years. The Individual subsequently resumed using alcohol and discontinued his participation in AA. Various sources who were interviewed by the OPM Representative during the Individual’s background investigation reported concerns about the Individual’s alcohol use. At least two ex-coworkers reported smelling alcohol on the Individual’s breath while at work. The DOE Psychiatrist reported smelling alcohol on the

⁵ 10 C.F.R. Part 710.8(j) does not include ARD-NOS in its list of alcohol related disorders which raise security concerns under Criterion J. Therefore, the ARD-NOS diagnosis’ sole relevance in this proceeding lies in the fact that it is evidence that the Individual habitually uses alcohol to excess.

⁶ The second wife informed the OPM Representative that the Individual’s excessive drinking was one of the reasons that their marriage had ended in divorce.

Individual's breath during his examination of the Individual. DOE Exhibit 6 at 9-10. At the conclusion of his examination of the Individual, the DOE Psychiatrist administered a series of laboratory tests to the Individual. Those tests showed a number of abnormalities commonly associated with excessive alcohol use: an abnormally elevated Gamma GT liver enzyme level, an abnormally elevated mean corpuscular volume, an abnormally low platelet count, and an abnormally elevated glucose level. DOE Exhibit 6 at 10. The DOE Psychiatrist's report states: "[the Individual's] laboratory test results very strongly suggest—but do not prove—that he is consuming alcohol excessively enough to cause mild liver damage and blood cell abnormalities." DOE Exhibit 6 at 10. The results of the laboratory tests administered by the DOE Psychiatrist are supported by the results of a series of laboratory tests previously administered by the Individual's treating physician. The laboratory tests administered by the treating physician showed that the Individual had an elevated mean corpuscular volume, which the treating physician believed was "probably due to alcohol ingestion." February 5, 2007 Electronic Mail Message from the DOE Psychiatrist to the DOE Counsel.⁷

Since July 25, 2006, when the Notification Letter was issued, the Individual has been aware that (1) continuing to use alcohol might well prevent him from obtaining a security clearance and (2) a psychiatrist had diagnosed him with an alcohol related disorder. Despite this knowledge, the Individual has continued to use alcohol. Tr. at 43.

The Individual contends that he doesn't have any problem with alcohol. Tr. at 51. The only argument or evidence offered by the Individual in support of this conclusion is his statement that

I don't feel that I become intoxicated. Well I do become intoxicated, because it relieves my physical pain to a certain degree, and if you call that intoxication, the removal of pain, yeah, then I do get there, but I do not excessively abuse alcohol to the point where I am unmanageable. I can manage my own physical and emotional states. I am aware of what I am doing . . . I don't get out of control, I guess.

Tr. at 52-53. The evidence discussed above supports a finding that the Individual has habitually used alcohol to excess and therefore provides a sound basis for the LSO's invocation of Criterion J.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. See *Personnel Security Hearing, Case No. VSO-0244*, 27 DOE ¶ 82,797, *affirmed* (OSA, 1999); *Personnel Security Hearing, Case No. VSO-0154*, 26 DOE ¶ 82,794 (1997), *affirmed*, *Personnel Security Review, Case No. VSA-0154*, 27 DOE ¶ 83,008 *affirmed* (OSA, 1998). In the end, like all Hearing Officers, I must exercise my common sense judgment in determining whether an individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R.

⁷ At the Hearing, the Individual testified that the results of the laboratory tests administered by his treating physician would show that he was not drinking excessively. Tr. at 43. The Individual subsequently submitted the results of that testing into the Record.

§ 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his habitual excessive alcohol use.

In the instant case, the Individual has failed to resolve the security concerns raised by his current habitual and excessive consumption of alcohol. The Individual continues to deny that he has a problem with alcohol, even when he has been made aware that continuing to drink may well have serious medical and occupational consequences.

Therefore, the security concerns associated with the Individual's habitual and excessive alcohol use remain unmitigated. Accordingly, the security concerns set forth in the Notification Letter under Criterion J remain unresolved.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has not resolved the security concerns raised under Criteria K and J. Therefore, the Individual has not demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should not be granted. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: March 20, 2007